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**DEPARTMENT OF HOMELAND SECURITY**

**Federal Emergency Management Agency**

**44 CFR Part 206**

**Docket ID FEMA-2010-0035**

**RIN 1660-AA68**

**Housing Assistance due to Structural Damage**

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice of proposed rulemaking.

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**SUMMARY:** Under the authority of section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), the Federal Emergency Management Agency (FEMA) provides grants to individuals and households to repair or replace their homes after a Presidentially-declared major disaster or emergency. FEMA proposes to revise its repair, replacement, and housing construction assistance regulations to clarify the eligibility criteria for assistance and implement changes to section 408 of the Stafford Act that were made by the Post-Katrina Emergency Management Reform Act of 2006 (PKEMRA).

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by docket ID FEMA-2010-0035, by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail/Hand Delivery/Courier: Regulatory Affairs Division, Office of Chief Counsel, 500 C Street, SW., Room 840, Washington, DC 20472-3100.

Instructions: All submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal e-Rulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the Privacy Notice link on the homepage of [www.regulations.gov](http://www.regulations.gov).

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at <http://www.regulations.gov>, click on “Advanced Search,” then enter “FEMA-2010-0035” in the “By Docket ID” box, then select “FEMA” under “By Agency,” and then click “Search.” Submitted comments may also be inspected at the Office of Chief Counsel, Federal Emergency Management Agency, 500 C Street, SW., Room 835, Washington, DC 20472-3100.

**FOR FURTHER INFORMATION CONTACT:** Lumumba T. Yancey, FEMA, Individual Assistance Division, 500 C Street, SW., Washington, DC 20472-3100, (phone) 202-212-1000, (facsimile) (202) 212-1005, or (email) [FEMA-IA-Regulations@fema.dhs.gov](mailto:FEMA-IA-Regulations@fema.dhs.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) provides the Federal Emergency Management Agency (FEMA) with the authority to administer the Individuals and Households grant program (IHP). See 42 U.S.C. 5174. Through the IHP, FEMA provides grants and/or direct assistance to help survivors recover from Presidentially-declared emergencies and major disasters. This help may be in the form of housing assistance as well as assistance to meet “other needs” such as medical, dental, funeral, fuel, or clothing costs.

Specifically, FEMA provides the following types of housing assistance:

Temporary Housing: Money is available to rent a different place to live for a limited period of time. When rental properties are not available, FEMA may provide direct assistance in the form of a temporary housing unit.

Housing Repair: Money is available to homeowners to repair disaster damage to their primary residence. Assistance is only available to repair damage that is not covered by insurance. The goal is to make the damaged home safe, sanitary, and functional.

Housing Replacement: Money is available to homeowners to replace their home if it was destroyed in the disaster. Assistance is only available for damage that is not covered by insurance.

Permanent and Semi-Permanent Housing Construction: In exceptional circumstances, FEMA is authorized to provide permanent and semi-permanent housing construction. If FEMA exercises its discretion to offer this form of disaster assistance, FEMA may provide money for the construction of a home, or may construct the new permanent or semi-permanent housing unit for an individual or

household. This type of assistance is currently provided only in remote and insular areas or locations specified by FEMA where no other type of housing assistance is available, feasible, or cost-effective. Assistance is provided only for damage that is not covered by insurance.

The regulations establishing the types of IHP assistance available, the eligibility requirements for assistance, and the procedures for obtaining assistance are in 44 CFR part 206, subparts D and F.

On September 30, 2002, FEMA published an interim rule in the Federal Register, identified by Regulation Identifier Number (RIN) 1660-AA18, which revised its regulations implementing the IHP. See 67 FR 61446. FEMA published a correction to the interim rule on October 9, 2002. See 67 FR 62896. Among other things, the interim rule established the housing repair, replacement, and construction eligibility regulations in 44 CFR 206.117. These regulations are currently in effect.

This proposed rule addresses the public comments received on the interim rule related to housing repair and replacement, and proposes revisions that are intended to clarify and improve FEMA's eligibility requirements for housing repair assistance. These proposed changes are intended to restate the existing requirements more clearly and in greater detail. They are not intended to create new eligibility requirements or add an additional burden on applicants.

In addition, the proposed rule implements and codifies legislative changes made after the interim rule was published. On October 4, 2006, the Post-Katrina Emergency Management Reform Act of 2006 (PKEMRA) amended section 408 of the Stafford Act which affected housing repair, replacement, and construction assistance. First, it

amended subsection 408(c)(2) of the Stafford Act by removing the subcaps that had limited the amount of IHP funds that could be used for housing repair and replacement. See 42 U.S.C. 5174(c) and section 686 of Public Law 109-295. This was a self-implementing statutory change, which went into effect immediately. FEMA no longer applies the housing repair and replacement subcaps. Individuals and households may use up to the full amount of IHP funds (\$31,400 for fiscal year 2012) for repair and replacement assistance. See 76 FR 63940 (Oct. 14, 2011). This figure is adjusted annually to reflect changes in the Consumer Price Index (CPI).

Second, PKEMRA amended subsection 408(c)(4) of the Stafford Act by removing the word “remote” and adding the word “semi-permanent.” While FEMA already had authority to provide “permanent housing construction” assistance, this statutory change provides FEMA with authority to provide assistance for the construction of “semi-permanent” housing. Prior to this statutory change, FEMA only had the authority to provide construction assistance to locations that were insular (outside the continental United States) or in remote areas where the other types of housing assistance were unavailable, infeasible, or not cost effective. The removal of the statutory requirement that a location be “remote” allows FEMA greater flexibility to provide construction assistance in other locations, when FEMA determines that the stringent statutory requirements are satisfied. See 42 U.S.C. 5174(c)(4) and section 685 of Public Law 109-295. Although this change would likely provide more flexibility for FEMA to meet the housing needs of disaster survivors, FEMA expects to exercise this authority only rarely. Typically, within the continental United States, alternative housing resources

and/or other types of temporary housing are available and feasible (e.g., rental housing or FEMA-provided temporary housing units).

## **II. Discussion of the Proposed Rule**

This rule proposes to do four things. First, it proposes to address the public comments received on the 2002 interim rule related to housing repair and replacement and proposes revisions to the interim rule as a result of those comments. Second, it proposes changes which are intended to restate the existing requirements more clearly and in greater detail, without substantively changing the underlying requirements. The changes should clarify IHP housing repair assistance requirements for potential applicants and make it easier for the public to understand why damage to their residence is (or is not) eligible for IHP assistance. These proposed changes are not intended to create new eligibility requirements or add an additional burden on applicants. Third, this rule proposes to revise the regulations to align with PKEMRA's removal of the housing repair and replacement subcaps. This is a non-discretionary conforming amendment that aligns the regulation with changes in the Stafford Act and FEMA's current operations. Finally, it proposes to add the term "semi-permanent" and to remove the term "remote" with respect to the eligibility requirements for housing construction, as authorized by PKEMRA.

When appropriate, FEMA will provide financial assistance to individuals and households to repair eligible real property components that are a part of their primary residence and were damaged by the event. To be eligible for repair assistance, the damage to the component must have been caused by the declared event and the component must have been functional before the event. Also, repair or replacement of

the component must be necessary to ensure the safety or health of the occupant or to make the residence functional. These eligibility requirements are currently in effect. See 44 CFR 206.117(b)(2), (c)(1). This rule proposes language that would revise the repair assistance regulations to restate the eligibility requirements more clearly.

If an individual or household's primary residence is damaged, and repair is not feasible, the individual or household may apply for housing replacement assistance. If FEMA awards replacement assistance, FEMA provides the individual or household financial assistance for the reasonable costs to replace their home, up to the maximum assistance set by law. The Disaster Mitigation Act of 2000 set a cap of \$5,000 for repair assistance, and \$10,000 for replacement assistance that an individual could use out of their maximum assistance award. See section 206 of Public Law 106-390. An individual was previously not allowed to use any additional funds from their maximum assistance award for the reasonable costs to repair or replace their home.

Under the current regulations, FEMA will provide replacement assistance if there is at least \$10,000 of disaster-related damage (as adjusted annually to reflect changes in the CPI). See 44 CFR 206.117(b)(3). If awarded replacement assistance, under the current regulations, the applicant can either (1) replace the dwelling in its entirety for \$10,000 (as adjusted annually to reflect changes in the CPI) or (2) use the assistance towards the cost of acquiring a new permanent residence that costs more than \$10,000. See 44 CFR 206.117(b)(3). This \$10,000 eligibility structure is no longer appropriate since PKEMRA removed the repair and replacement subcaps from the Stafford Act. FEMA proposes to remove the \$10,000 subcap and eligibility threshold from the regulations, but maintain the underlying concept that replacement assistance is only

available when the applicant must replace the damaged dwelling in its entirety. To accomplish this, FEMA proposes that to be eligible for housing replacement assistance, all parts of the dwelling's structure must have been compromised and deemed not repairable.

FEMA also proposes to remove the \$5,000 subcap for repair assistance from the regulations, to reflect current law and FEMA policy. With the \$5,000 subcap for repair assistance removed, individuals and households continue to be granted up to the full amount of IHP funds (\$30,200 for fiscal year 2011) for repairs, when repairs are feasible and replacement assistance is not warranted. This change does not reduce available repair assistance funds.

In exceptional circumstances, FEMA is authorized to provide permanent or semi-permanent housing construction assistance. If FEMA exercises its discretion to offer this form of housing assistance in a specific disaster, FEMA may fund the construction of a permanent or semi-permanent dwelling for an individual or household. This type of assistance is only provided in those situations where the other types of FEMA housing assistance are unavailable, infeasible, or not cost effective. This limitation exists in FEMA's current regulations and is not changed by this proposed rule. See 44 CFR 206.117(b)(4). FEMA proposes to revise the regulatory language to conform to changes to the Stafford Act. The Stafford Act now provides that housing construction may be permanent or semi-permanent and the requirement that FEMA provides assistance only in remote areas has been removed. FEMA proposes to define "semi-permanent housing" as housing with a life expectancy of more than 5 years, but less than 25 years. Housing with a life expectancy of less than 5 years would be deemed temporary housing and that



over 25 years would be deemed permanent housing. FEMA has the authority to provide this type of assistance in insular areas outside the continental United States, as well as in other locations where no alternative housing resources are available or where other types of FEMA housing assistance are unavailable, infeasible, or not cost-effective. See 42 U.S.C. 5174(c) and section 685 of Public Law 109-295.

The basic eligibility requirements for housing assistance are not changed by this proposed rule. To be eligible for housing assistance, the damage must not be covered by insurance, the damage must be to a dwelling owned and occupied by the applicant, and it must have served as the applicant's pre-disaster primary residence. Just as fundamentally, section 408 requires that all assistance be for "necessary expenses and serious needs" that arose as a "direct result" of the disaster; thus, repair and replacement assistance are provided only to applicants whose residences were "damaged by" the disaster. See 42 U.S.C. 5174(a)(1), (b), (c); 42 U.S.C. 5155; 44 CFR 206.113, 206.117(b). To provide greater clarity to the requirement that the damage is a direct result of the disaster, FEMA proposes to make changes to 44 CFR 206.117(a), (b)(2), (b)(3), (b)(4), and remove paragraph (c). The following discussion will address the proposed revisions to 44 CFR 206.117, paragraph by paragraph.

#### **44 CFR 206.117 -Paragraph (a) Definitions**

As with all of FEMA's IHP housing assistance regulations in 44 CFR part 206 subpart D, the definitions in 44 CFR 206.111 apply to 44 CFR 206.117. However, FEMA finds that to provide clarity to the housing assistance regulations additional definitions may be necessary. FEMA proposes to revise 44 CFR 206.117(a) to define particularly important terms applicable to the housing repair, replacement and

construction requirements. These proposed definitions would be applicable to 44 CFR 206.117 only. In paragraph (a), FEMA proposes to add new definitions for “Caused by the disaster”; “Real property component” and “component”; and “Semi-permanent housing.” Each of these terms is particularly important in the interpretation of FEMA’s housing repair assistance regulations.

#### **44 CFR 206.117 - Paragraph (b)(2) Repair Assistance**

Paragraph (b) addresses repair assistance. In paragraph (b)(2)(i), FEMA proposes to clearly notify applicants that the eligibility criteria for individuals and households who apply for IHP assistance set forth in 44 CFR 206.113 also apply to 206.117(b)(2). Not only must the component be eligible, but the applicant must be eligible. FEMA proposes to add the cross reference to ensure that those requirements are not overlooked. This is not a substantive change.

Second, FEMA proposes to reorganize the general eligibility requirements in proposed paragraph (b)(2)(i) into a checklist format. Although the presentation has changed, the proposed text contains no new substantive requirements. These requirements are all contained in current 44 CFR 206.117(b)(2)(i) and (b)(2)(ii).

Third, although they are not new, FEMA proposes to clarify these existing requirements. Most notably, the current requirement that the damage must be “disaster-related” has been broken into two parts. As proposed, the component must have been functional immediately before the event, and the component must have been damaged and made not functional by the event. FEMA has historically used these two criteria to determine if damages are “disaster-related.” These two criteria break down the existing requirement, and make it easier to understand what FEMA means by the term “disaster-

related damages.” FEMA cannot determine that a component that did not work before the event is not functional as a result of the event.

Further, the disaster must have actually caused damage to the component. If the damage was caused by an unrelated event, it is not eligible. FEMA has proposed language in paragraphs (b)(2)(iii) through (v) further clarifying the extent of available assistance. Those paragraphs are discussed later in this preamble.

The language in proposed paragraph (b)(2)(ii) restates the existing language in 44 CFR 206.117(c)(1). The substance of proposed paragraphs (b)(2)(ii)(A), (B), and (C) is unchanged. In new paragraph (D), FEMA proposes to remove the word “plumbing” because it is covered by the terms “water” and “sewage,” which remain. In paragraph (E), FEMA proposes to remove the word “doors” because they are included in proposed paragraph (B). Proposed paragraphs (F), (G), and (H) remain substantively unchanged except that FEMA merged the language in current paragraph (b)(2)(iii), setting out the type of hazard mitigation measures that are eligible, into proposed paragraph (H). FEMA intends no substantive change in application of the regulation as a result of these changes.

In proposed paragraph (b)(2)(iii), FEMA would clarify that not only the type of repair, but also the eligibility of the component itself, will vary depending on the nature of the disaster. This aligns with the existing eligibility requirement that the component must have been damaged by the event. The nature of an event will indicate whether the component would likely have been damaged by it. As an example, drywall on the second floor is unlikely to have been damaged from a three-foot flood.

Also in proposed paragraph (b)(2)(iii), FEMA would add new language noting that repair will be provided only to the extent that it makes the component functional.

FEMA does not provide repairs or replacement to further improve a component beyond making it functional. IHP is not a loss indemnification program and does not ensure that applicants are returned to their pre-disaster living conditions. As an example, if only the condenser is damaged on a heating and air conditioning system, FEMA would provide assistance to repair the condenser, not replace the entire system, even if the system is near the end of its service life. Finally, in proposed paragraph (b)(2)(iii) FEMA restates the limitations in current paragraph (b)(2)(ii) that replacement assistance will only be provided when repair is not feasible, and current paragraph (c)(1) that repairs are limited to restoring the residence to a safe and sanitary living or functioning condition.

Proposed paragraph (b)(2)(iv) is new. It is intended to clarify the requirement in proposed paragraph (b)(2)(i)(B) that the component was functional immediately before the event. Components need not be fully functional before the event, nor is it disqualifying if the component posed a risk before the event. The key is that it must have had some functionality before the event, and incurred a change in functionality (must become unfunctional) as a result of the event.

Proposed paragraph (b)(2)(v) revises the content of current paragraph (b)(2)(iv) to remove the housing repair subcap. This change would conform the regulation to statutory changes in section 408(c)(2) of the Stafford Act. See 42 U.S.C. 5174(c) and section 686 of Public Law 109-295. FEMA stopped applying the subcaps when the Stafford Act was amended, therefore, the removal of this cap from the regulatory text will not have a substantive impact on the public. In the proposed rule, FEMA clearly states that individuals and households may use the entire amount of assistance available under the IHP for repair, or if FEMA determines that repair is infeasible, for replacement.

Proposed paragraph (b)(2)(vi) remains unchanged from the text of the current paragraph (b)(2)(v).

The language of proposed (b)(2)(vii) is new, but the substance is not. Applicants for housing repair assistance currently have the opportunity to appeal FEMA's eligibility determinations pursuant to 44 CFR 206.115. FEMA proposes to add an explicit cross reference to ensure that they are aware of the opportunity.

Further, FEMA's initial determination is based on an on-scene inspection performed by a FEMA inspector. If the applicant disagrees with the inspection and has information that would contradict the inspector's report, on appeal it is the applicant's responsibility to provide the documentation so that FEMA may appropriately evaluate eligibility. Depending on the reason for the denial or the substance of the applicant's dispute, an applicant may need to provide proof of occupancy, ownership, income, loss, and/or information concerning their housing situation prior to the disaster. In case it is later needed to support the claim, the applicant should keep, for 3 years, all receipts and records for any housing expenses incurred as a result of the disaster. See "Help After a Disaster: Applicant's Guide to the Individuals & Households Program" at <http://www.fema.gov/assistance/process/guide.shtm>. This includes receipts for repair supplies and labor. To ensure that applicants are aware of their burden of proof on appeal, FEMA proposes to specifically highlight the documentation needed for an appeal. These are not new requirements, because generally, for applicants to successfully challenge a FEMA determination, they must show proof as to why they believe the determination was incorrect.

#### **44 CFR 206.117 - Paragraph (b)(3) Housing Replacement**

In this paragraph, FEMA proposes five changes. First, we propose to remove the housing replacement subcap to conform with statutory changes to section 408(c)(2) of the Stafford Act. See 42 U.S.C. 5174(c) and section 686 of Public Law 109-295. FEMA is no longer required to cap the amount of available IHP assistance applied to housing replacement. In the proposed rule, FEMA clearly states that individuals and households may use the entire amount of assistance available under the IHP for this purpose.

Second, we propose to remove the eligibility requirement that the disaster-related damage meet or exceed \$10,000 (as adjusted annually to reflect changes in the CPI). FEMA proposes to remove the \$10,000 subcap, but maintain the underlying intent that replacement assistance only be provided where repair assistance is insufficient. To do so, FEMA proposes to revise paragraph (b)(3) to allow for replacement assistance if repair to an owner-occupied primary residence damaged by the declared event is not feasible, will not ensure the safety or health of the occupant, or will not make the residence functional.

Third, in response to a comment on the interim rule, FEMA proposes to reassign the authority to approve replacement assistance awards. FEMA proposes to change this authority from the FEMA “Associate Administrator” to the FEMA “Regional Administrator or his or her designee.” This change is intended to speed the processing of housing replacement assistance.

Fourth, just as with repair assistance, applicants must meet the eligibility requirements of 44 CFR 206.113 to be considered for replacement assistance. The residence must also have been functional immediately before the declared event, must have been damaged by the event, and the damage must not have been covered by insurance. These are the current requirements for replacement assistance; however, as

with repair assistance, the requirements are not currently set out in checklist form in the regulations. Further, FEMA finds that it may be confusing to applicants that the basis for the amount of replacement assistance is in current paragraph (c), while the other eligibility requirements are contained in paragraph (b)(3). To address this, FEMA proposes to list the eligibility requirements in checklist form, mirroring those elements for repair assistance. FEMA also proposes to move the current text in paragraph (c)(2) to new paragraph (b)(3)(iii) without substantive change.

Finally, FEMA proposes to add a new paragraph (b)(3)(iv). As with repair assistance, FEMA finds it may be beneficial to provide a cross reference to the appeal regulations at 44 CFR 206.115, as well as, clarify that the applicant must also provide proof that the residence is eligible for replacement assistance. These are not new requirements, but merely list the necessary elements of an appeal.

#### **44 CFR 206.117 - Paragraph (b)(4) Permanent and Semi-Permanent Housing Construction**

As with current paragraph (b)(3), FEMA proposes to consolidate the requirements for housing construction assistance by stating the eligibility requirements in checklist format and re-designating the current text of paragraph (b)(4) as paragraph (b)(4)(i), and moving the current text in paragraph (c)(3) to new paragraph (b)(4)(ii) without substantive change.

Also, section 685 of PKEMRA amended section 408(c)(4) of the Stafford Act by inserting “or semi-permanent” after “permanent” and by striking the word “remote.” These changes allow FEMA to provide not only permanent housing construction assistance, but also to construct semi-permanent housing. Further, this type of assistance

is no longer limited to remote locations, but can be provided in those exceptional cases where alternative housing resources are not available and the other types of housing assistance provided by FEMA are unavailable, infeasible, or not cost effective. FEMA proposes to revise its housing construction regulations in new paragraph (b)(4)(i) to conform with these statutory changes. FEMA expects to provide this type of assistance in very rare circumstances. Alternative housing resources and the other types of housing assistance should sufficiently address a community's housing needs in most circumstances.

Finally, FEMA proposes to add a new paragraph (b)(4)(iii). As with repair and replacement assistance, FEMA finds it may be beneficial to provide a cross reference to the appeal regulations at 44 CFR 206.115, as well as clarify that the applicant must also provide proof that the residence is eligible for construction assistance. These are not new requirements, but merely list the necessary elements of an appeal.

#### **44 CFR 206.117 - Paragraph (c) Eligible Costs**

As noted above, FEMA proposes to distribute the substance of current paragraph (c) throughout proposed paragraph (b). Therefore, FEMA proposes to remove paragraph (c).

### **III. Response to Comments from the Interim Rule Related to Housing Repair Assistance**

In response to the interim rule, FEMA received written comments from five States. This section addresses the portion of those comments regarding housing repair assistance.

#### **Caps on Repair and Replacement Assistance**



One State recommended modification of the \$5,000 cap, expressing concern that the repair cap may not bring homes into compliance with local minimum standards. The commenter stated that where there are no local standards, the low cap may force individuals and households to return to unsafe conditions. FEMA agreed with the commenters regarding the caps, and sought a modification to the statute. See 67 FR 61447. Another commenter raised similar concerns regarding the \$10,000 cap on replacement assistance.

On October 4, 2006, PKEMRA amended section 408(c)(2) of the Stafford Act, by removing the repair and replacement caps. See 42 U.S.C. 5174(c). This was a self-implementing change which went into effect immediately, and FEMA no longer applies the caps. FEMA proposes to revise current 44 CFR 206.117(b)(2)(iv) and (b)(3) to remove the repair and replacement caps.

Approval authority for replacement assistance (44 CFR 206.117(b)(3))

One State noted that approval at the Associate Administrator level was a deterrent to timely and compassionate assistance. The commenter recommended that the Regional Administrator be given approval authority for replacement assistance.

In response to this comment, FEMA proposes to revise 44 CFR 206.117(b)(3) by replacing “Associate Director” with “Regional Administrator or his or her designee.” FEMA proposes this change because the Regional Administrator will have greater familiarity with the damage in his or her region, and with greater decentralization housing replacement applications may be processed faster.

**IV. Individuals and Households Program Implementation Review Report**

During the comment period on the interim rule, FEMA met with the staff of five States in which the IHP was first implemented. The State and FEMA recovery program staff that first implemented IHP worked six disasters: DR-1439-TX which resulted from severe storms, tornados, and flooding in Texas; DR-1440-AK which resulted from an earthquake in Alaska; DR-1441-TN which resulted from severe storms, tornados, and flooding in Tennessee; DR-1442-AL which resulted from severe storms and tornados in Alabama; DR-1443-MS which resulted from severe storms and tornados in Mississippi; and DR-1444-OH which resulted from severe storms and tornados in Ohio. The participants in the meeting were asked to identify best practices and problems or issues that needed corrective action. The meeting resulted in the Individuals and Households Program Implementation Review Report (Report), a copy of which is available in the docket for this rulemaking on [www.regulations.gov](http://www.regulations.gov). The recommendations focused primarily on procedural or other aspects of IHP that were not affected by this rule. Two issues in that report affect this rulemaking. Those issues and their resolution are:

Issue: Revise the \$5,000 and \$10,000 statutory limits.

Status or Resolution: As discussed elsewhere in this preamble, PKEMRA amended section 408(c)(2) of the Stafford Act, 42 U.S.C. 5174(c), by removing the repair and replacement caps. As a result, FEMA proposes to revise the regulations to remove both the \$5,000 repair cap and the \$10,000 replacement cap.

Issue: Replacement – establish uniform policy and flexible procedures.

Status or Resolution: In this proposed rule, FEMA attempts to improve its housing replacement assistance program. FEMA's procedures allow for flexibility, yet protect against abuse. In this proposed rule, FEMA delegates the decision regarding

replacement eligibility to the Regional Administrators, provides clarity and cross references to appeal rights, clarifies eligibility criteria, and expands the amount of assistance by removing the repair and replacement subcaps. By clarifying the requirements, and making the regulations easier to read, FEMA intends to create uniformity in application.

## **V. Records Management**

The Regulation Identifier Number (RIN) listed in the September 30, 2002 interim rule and the correction to the interim rule was 3067-AD25. When FEMA became a component of the Department of Homeland Security (DHS) in 2003, FEMA's RINs were renumbered, and 3067-AD25 became 1660-AA18.

The Docket ID for 1660-AA18 is FEMA-2008-0005. All of 1660-AA18's public submissions, supporting and related documents, and rules are posted to Docket ID FEMA-2008-0005. The public comments that addressed housing repair assistance, the subject of this rulemaking, have also been posted to Docket ID FEMA-2010-0035.

## **VI. Regulatory Analysis**

### **A. Executive Order 12866, Regulatory Planning and Review and Executive Order 13563, Improving Regulation and Regulatory Review**

FEMA has prepared and reviewed this rule consistent with Executive Order 12866, Regulatory Planning and Review (58 FR 51735, Oct. 4, 1993) as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review (76 FR 3821, Jan. 18, 2011). This proposed rule is not a significant regulatory action, and therefore has not been reviewed by the Office of Management and Budget (OMB).

This proposed rule is intended to provide clarification with respect to the eligibility for housing repair assistance, without adding new requirements, as well as implement changes to section 408 of the Stafford Act made by PKEMRA. See 42 U.S.C. 5174. This rule will not impose any additional burden on the public or change the total amount of assistance available to individuals and households since this rule merely codifies FEMA practice since 2006.

The proposed changes resulting from PKEMRA (a) revise the regulations to align with PKEMRA's removal of the housing repair and replacement subcaps; (b) remove the limitation that housing construction assistance be provided only in a "remote" area, if the location is not otherwise insular (outside the continental United States); and (c) incorporate FEMA's new authority to provide assistance for the construction of "semi-permanent" housing.

When the current regulations were written, FEMA was prohibited from providing more than \$5,000 (adjusted annually to reflect changes in the CPI) for repair assistance, and more than \$10,000 (adjusted annually to reflect changes in the CPI) for replacement assistance under the Disaster Mitigation Act of 2000. These subcaps prevented applicants from spending all of their available IHP assistance (in fiscal year 2012, this amount is \$31,400 per declared event (76 FR 63940, Oct. 14, 2011)) on housing repair or replacement, leaving nothing for their other needs such as clothing, funeral, or medical costs. The change in PKEMRA was self implementing and immediately went into effect. FEMA is no longer required to apply subcaps and has not applied them since PKEMRA became law in 2006. This rule change is intended to revise the regulations to conform to the statutory change and FEMA's current practice. It would not change the eligibility

criteria and would not reduce the total amount of assistance available to individuals and households. This proposed change would not have an economic impact because it merely codifies FEMA current practice.

This rule also proposes to remove the term “remote” from 44 CFR 206.117(b)(3) to implement new authority to provide housing construction assistance in areas within the continental United States where alternative housing resources are not available, infeasible, or not cost effective. Currently, FEMA’s regulations limit this type of assistance to only locations that are insular or remote. This proposed rule change would implement PKEMRA by providing housing construction assistance to disaster survivors in areas where alternative housing resources are not feasible. This rule change provides more flexibility for FEMA to meet the housing needs for disaster survivors, although it is expected that FEMA will only rarely exercise this authority. This is because alternative housing resources, such as rental units, manufactured housing, recreational vehicles, other readily fabricated dwellings, or FEMA-provided temporary housing units, typically are available within the continental United States. FEMA has not yet provided any direct assistance for housing construction in areas other than those that are remote and insular. This proposed change is not expected to have a significant economic impact or to negatively affect the eligibility criteria for assistance. Any economic impact from this proposed rule change would be an increase in Federal grant funds provided to individuals and households to provide housing in those extremely rare cases where alternative housing resources are not available, infeasible, or not cost effective. There would be no increased burden imposed on the public from this proposed change. There is no

economic impact to this proposed change because this proposed rule merely codifies FEMA current practice since 2006.

This rule also proposes to add “semi-permanent” to the types of housing that could be constructed. This type of housing would be that with a life expectancy of more than 5 years, but less than 25 years. While FEMA already provides temporary and permanent housing, by implementing this new authority, FEMA would have greater flexibility to meet the needs of a particular community, where the construction of a type of housing other than a long-term permanent structure may be more appropriate.

Although this rule change is likely to provide more flexibility for FEMA to meet the housing needs for disaster survivors, it is not expected that FEMA will regularly exercise this authority. This proposed rule change would implement PKEMRA by giving FEMA more options in providing housing assistance to disaster survivors. It would not reduce the number of individuals or households eligible for housing assistance and would not affect eligibility requirements. There is no economic impact to this proposed change because this proposed rule merely codifies FEMA current practice.

#### B. Paperwork Reduction Act of 1995

FEMA determined that this proposed rule will not create a new collection of information or create a revision to an existing collection of information under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501-3520. All information submitted by applicants seeking IHP housing assistance, including information submitted on appeal, is included in Office of Management and Budget (OMB) approved collections.

The following collections related to IHP have been approved by OMB under the following titles and control numbers: “Disaster Assistance Registration”, OMB control

number 1660-0002, expiration date August 31, 2013 and “Federal Assistance to Individuals and Households Program (IHP)”, OMB control number 1660-0061, expiration date October 31, 2014. There would be no additional paperwork burden as a result of the changes proposed in this rule.

#### C. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121, 110 Stat. 857), FEMA must consider the impact of this proposed regulation on small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This proposed rule clarifies the eligibility criteria for housing repair, replacement, and construction assistance to individuals and households. It will not have an economic impact on small entities because it merely codifies FEMA current practice since PKEMRA became law in 2006. FEMA certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities.

#### D. Privacy Act

The Privacy Act of 1974, 5 U.S.C. 552a, establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of personally identifiable information about individuals that is maintained in systems of records by Federal agencies. A system of records is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifier assigned to the individual. FEMA, in partnership with other Federal agencies,

hosts a single application and resource center at <http://www.disasterassistance.gov> that allows the public to apply for disaster assistance, benefits, and other services within FEMA and other Federal agencies. This application and resource center contains personally identifiable information about IHP applicants seeking housing repair, replacement, or construction assistance. The application resource center is contained in a Privacy Act System of Records entitled “Disaster Recovery Assistance Files” number “DHS/FEMA-008” which published on September 24, 2009 in the Federal Register at 74 FR 48763. This proposed rule would not change the application materials received or result in a new collection of personally identifiable information about individuals.

#### E. National Environmental Policy Act

Under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq., an agency must prepare an environmental assessment and environmental impact statement for any rulemaking that significantly affects the quality of the human environment. FEMA has determined that this rulemaking does not significantly affect the quality of the human environment and consequently has not prepared an environmental assessment or environmental impact statement. Most activities under section 408 and prior section 411 of the Stafford Act pertaining to temporary housing and financial assistance are categorically excluded from NEPA review under 44 CFR 10.8(d)(2)(xix)(D) and (F). Before undertaking other activities that are not categorically excluded (e.g., placement of manufactured temporary housing units on FEMA-constructed group sites; permanent or semi-permanent housing construction), FEMA follows the procedures set forth in 44 CFR part 10 to assure NEPA compliance.

#### F. Executive Order 13132, Federalism



Executive Order 13132, Federalism, sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. See Executive Order 13132, 64 FR 43255, Aug. 10, 1999. Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and to the extent practicable, must consult with State and local officials before implementing any such action. The disaster assistance addressed by this proposed rule is provided to individuals and families, and would not have federalism implications.

G. Executive Orders 11988 and 11990, Floodplain Management and Protection of Wetlands

Under Executive Order 11988, Floodplain Management, as amended, Federal agencies are required to “provide leadership to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains.” See Executive Order 11988, as amended, 42 FR 26951, May 25, 1977, 44 FR 43239, July 20, 1979. Under Executive Order 11990, Protection of Wetlands, Federal agencies are required to “provide leadership and ... take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency’s responsibilities.” See Executive Order 11990, as amended, 42 FR 26961, May 25, 1977, 52 FR 34617, Sept. 14, 1987. The requirements of these Executive Orders apply in the context of the provision of Federal financial assistance

relating to, among other things, construction and property improvement activities, as well as conducting Federal programs affecting land use. The changes proposed in this rule would not have an effect on land use, floodplain management or wetlands. When FEMA undertakes specific actions that may have such effects (e.g., placement of manufactured temporary housing units on FEMA-constructed group sites; permanent or semi-permanent housing construction), FEMA follows the procedures set forth in 44 CFR part 9 to assure compliance with these Executive Orders.

#### H. Executive Order 13045, Protection of Children From Environmental Health Risk and Safety Risks

FEMA has analyzed this proposed rule under Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks, 62 FR 19883, Apr. 23, 1997. This rule is not an economically significant rule and would not create an environmental risk to health or safety that might disproportionately affect children.

#### I. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 et seq., pertains to any proposed rulemaking which implements any rule that includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. The Act also applies to any regulatory requirements that might significantly or uniquely affect small governments. FEMA has determined that this proposed rule would not result in the expenditure by State, local and Tribal governments, in the aggregate, nor by the private sector, of \$100,000,000 or more in any one year as a

result of a Federal mandate, nor would it significantly or uniquely affect small governments.

J. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

Under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, FEMA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian Tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by the Tribal government, or FEMA consults with those governments. See Executive Order 13175, 65 FR 67249, Nov. 9, 2000. This proposed rule would not significantly or uniquely affect the communities of Indian Tribal governments, nor would this proposed rulemaking impose substantial direct compliance costs on those communities.

K. Executive Order 12898, Environmental Justice

Under Executive Order 12898, Environmental Justice, each Federal agency must conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in, denying persons the benefit of, or subjecting persons to discrimination because of their race, color, or national origin. See Executive Order 12898, 59 FR 7629, Feb. 16, 1994. FEMA has incorporated environmental justice into its policies and programs.

The proposed housing repair, replacement and construction assistance regulations intentionally contain provisions that ensure they would not have a disproportionately high

and adverse human health effect on any segment of the population. This rulemaking clarifies the eligibility requirements for assistance, and in doing so, maintains focus on the functionality of the component being repaired or replaced, and does not consider income or home value. Section 408 of the Stafford Act requires that such assistance be granted only for damage caused by a disaster event. Non-disaster related damage is not eligible for assistance under the Stafford Act. To ensure that this limitation will not be improperly exclusive, this proposed rule would clarify that components being repaired or residences being replaced need not be in full working order before the event to qualify for assistance. Components or residences that were fully or partially functional immediately before the declared event, despite their need for maintenance, may be eligible for repair assistance if they ceased to function as a result of the disaster.

One commenter stated that the proposed rule did not overtly discriminate against disaster survivors based on race, color, or national origin, but that it did discriminate covertly against those who are financially challenged, and, to the extent that the financially challenged consist disproportionately of minority groups, one might conclude that an element of the IHP program lacks environmental justice. The commenter stated that the housing repair cap of \$5,000 has a gross negative impact on low-income disaster survivors, and results in more low-income disaster survivors returning to unsafe, unsanitary, and/or non-functional homes. The commenter stressed that low-income individuals were less likely to qualify for SBA loans, and Other Needs Assistance does not assist with structural repairs. Consequently, low-income individuals might have no choice but to move back into an unsuitable environment. The commenter recommended

the liberal use of replacement assistance to provide additional help for the financially challenged.

As discussed elsewhere in this preamble, the \$5,000 subcap is no longer in effect, and individuals and households may use up to the full amount of IHP funds (\$31,400 for fiscal year 2012) for repair and replacement assistance. See 76 FR 63940 (Oct. 14, 2011). This figure is adjusted annually to reflect changes in the Consumer Price Index (CPI).

No action that FEMA can anticipate under this proposed rule would have a disproportionately high and adverse human health effect on any segment of the population. In addition, the rulemaking would not impose substantial direct compliance costs on those communities.

#### L. Executive Order 12988, Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. See Executive Order 12988, 61 FR 4729, Feb. 7, 1996.

#### M. Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights

FEMA has reviewed this rule under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, as supplemented by Executive Order 13406, Protecting the Property Rights of the American People. See Executive Order 12630, 53 FR 8859, Mar. 18, 1988 and Executive Order 13406, 71 FR 36973, June 28, 2006. This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630.

## List of Subjects in 44 CFR Part 206

Administrative practice and procedure, Coastal zone, Community facilities, Disaster assistance, Fire prevention, Grant programs-housing and community development, Housing, Insurance, Intergovernmental relations, Loan programs-housing and community development, Natural resources, Penalties, and Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Federal Emergency Management Agency proposes to amend 44 CFR part 206 as follows:

### **PART 206—FEDERAL DISASTER ASSISTANCE**

1. The authority citation for part 206 continues to read as follows:

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; Homeland Security Act of 2002, 6 U.S.C. 101; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; and E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

2. Amend § 206.117 to remove paragraph (c) and to revise paragraphs (a), (b)(2), (b)(3), and (b)(4) to read as follows:

#### § 206.117 Housing assistance.

- (a) Definitions. The definitions in this paragraph apply to this section only.

Caused by the disaster means as a direct result of a peril identified in the Federal Register Notice of a Presidentially-declared major disaster or emergency, the component is no longer functional.

Real Property Component or Component means each individual part of a dwelling that makes it habitable, as enumerated in paragraph (b)(2)(ii) of this section.

Semi-Permanent Housing means housing designed and constructed with finishes, material, and systems selected for moderate (or better) energy efficiency, maintenance, and life cycle cost, and with a life expectancy of more than 5 years but less than 25 years.

(b) \* \* \*

(2) Repairs. (i) FEMA may provide financial assistance for the repair of real property components in an owner's primary residence if:

- (A) The eligibility criteria in §206.113 are met;
- (B) The component was functional immediately before the declared event;
- (C) The component was damaged, and the damage was caused by the disaster;
- (D) The damage to the component is not covered by insurance; and
- (E) Repair of the component is necessary to ensure the safety or health of the

occupant or to make the residence functional.

(ii) FEMA may provide financial assistance for the repair of:

- (A) Structural components of the residence. This includes real property components, such as the foundation, exterior walls, and roof.
- (B) Windows and doors.
- (C) The Heating, Ventilation and Air Conditioning system.
- (D) Utility systems. This includes electrical, gas, water and sewage systems.
- (E) Interior components. This includes, but is not limited to, the structure's floors, walls, ceilings, and cabinetry.
- (F) The structure's access and egress, including privately owned access roads and privately owned bridges.

(G) Blocking, leveling, and anchoring of a mobile home, and reconnecting or resetting mobile home sewer, water, electrical and fuel lines and tanks.

(H) Items or services determined to be eligible hazard mitigation measures that reduce the likelihood of future damage to the residence, utilities, or infrastructure.

(iii) The components that may be deemed eligible for repair assistance, and the type of repairs authorized, will vary depending upon the nature of the disaster. Repairs are limited to restoration of the dwelling to a safe and sanitary living or functioning condition. Repair assistance will only be provided to the extent that the work makes the component functional. FEMA may provide for the replacement of components if repair is not feasible. The repairs of components must be of average quality, size, and capacity, taking into consideration the needs of the occupant.

(iv) Components that were functional immediately before the declared event may be eligible for repair assistance if the damage to the component was caused by the disaster and the component is no longer functional.

(v) Eligible individuals or households may receive up to the maximum amount of assistance (See §206.110(b)) to repair damages to their primary residence irrespective of other financial resources, except insurance proceeds.

(vi) The individual or household is responsible for obtaining all local permits or inspections that applicable State or local building codes may require.

(vii) If the applicant disputes a determination made by FEMA regarding eligibility for repair assistance, the applicant may appeal that determination pursuant to the procedures in §206.115. In addition to the requirements in §206.115, the applicant must provide proof that the component meets the requirements of paragraph (b)(2)(i) of



this section, including that the component was functional before the declared event and proof that the declared event caused the component to stop functioning. If the applicant disputes the amount of repair assistance awarded, the applicant must also provide justification for the amount sought.

(3) Housing Replacement. (i) FEMA may provide financial assistance for the replacement of an owner's primary residence if:

- (A) The eligibility criteria in §206.113 are met;
- (B) The residence was functional immediately before the disaster;
- (C) The residence was destroyed, and the damage was caused by, the disaster;
- (D) The damage to the residence is not covered by insurance;
- (E) Repair is not feasible, will not ensure the safety or health of the occupant, or will not make the residence functional; and
- (F) Replacement is necessary to ensure the safety or health of the occupant.

(ii) All replacement assistance awards must be approved by the Regional Administrator or his/her designee. If replacement assistance is granted, the applicant may either use the maximum amount of assistance (See §206.110(b)) to replace the dwelling in its entirety, or may use the assistance toward the cost of acquiring a new permanent residence.

(iii) Housing replacement assistance will be based on the verified disaster-related level of damage to the dwelling, or the statutory maximum (See §206.110(b)), whichever is less.

(iv) If the applicant disputes a determination made by FEMA regarding eligibility for replacement assistance, the applicant may appeal that determination pursuant to the

procedures in §206.115. In addition to the requirements in §206.115, the applicant must provide proof that repair is not feasible, or will not ensure the safety or health of the occupant or make the residence functional. If the applicant disputes the amount of replacement assistance awarded, the applicant must also provide justification for the amount sought.

(4) Permanent and semi-permanent housing construction. (i) FEMA may provide financial or direct assistance to applicants for the purpose of constructing permanent and semi-permanent housing if:

- (A) The eligibility criteria in §206.113 are met;
- (B) The residence was functional immediately before the declared event;
- (C) The residence was damaged by the event;
- (D) The damage to the residence is not covered by insurance;
- (E) The residence was an owner-occupied primary residence; and
- (F) The residence is located in an insular area outside the continental United

States or in another location where alternative housing resources are not available and the types of financial or direct temporary housing assistance described in paragraphs (b)(1), (2), and (3) of this section are unavailable, infeasible, or not cost-effective.

(ii) Permanent and semi-permanent housing construction, in general, must be consistent with current minimal local building codes and standards where they exist, or minimal acceptable construction industry standards in the area, including reasonable hazard mitigation measures, and Federal environmental laws and regulations. Dwellings will be of average quality, size and capacity, taking into consideration the needs of the occupant.

(iii) If the applicant disputes a determination made by FEMA regarding eligibility for construction assistance, the applicant may appeal that determination pursuant to the procedures in §206.115. In addition to the requirements in §206.115, the applicant must provide proof that the property is either located in an insular area outside the continental United States, or in a location where alternative housing resources are not available. The applicant must also provide proof that the types of financial or direct temporary housing assistance described in paragraph (b)(1) of this section are unavailable, infeasible, or not cost effective. If the applicant disputes the amount of construction assistance awarded, the applicant must also provide justification for the amount sought.

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**W. Craig Fugate,**  
Administrator,  
Federal Emergency Management Agency.

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